COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

{Chapter VIII, Rule 32(2)(b)}

Description of the Case.

CRIMINAL APPEAL NO.2047 OF 2001
(Old No. 1498 of 1989)

Brijesh S/o Seoraj Singh **... Appellant**

Versus

State **... Opposite Party**

Sri B.D. Upadhyaya & Sri Atul Tripathi, learned counsel for appellant.
Sri Amit Bhatt, Addl. G.A. for the State.

Approved for reporting
~~Not approved for reporting.~~

Date: June 19, 2007

(Dharam Veer, J.)

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

CRIMINAL APPEAL No.2047 of 2001
(Old No.1498 of 1989)

Brijesh S/o Seoraj Singh, R/o Natha Singh Jatwara,
P.S. Jaspur, District Nainital

.....Appellant

Versus

The State ..... Opp. Party

Dated: June 19, 2007

Sri B.D. Upadhyaya & Sri Atul Tripathi, learned counsel for the appellant
Sri Amit Bhatt, learned Addl. G.A. for the State

HON. DHARAM VEER, J.

This appeal, preferred under Section 374(2) of Code of Criminal Procedure 1973 *(hereinafter to be referred as Cr.P.C.)*, is directed against the judgment and order dated 23.06.1989 passed by II Additional Sessions Judge, Nainital in Session Trial No.170 of 1988, State Vs. Brijesh, whereby the learned II Additional Sessions Judge has convicted the appellant u/s 326 of Indian Penal Code, 1860 *(hereinafter to be referred as I.P.C.)* and sentenced him for three years R.I.

2. This appeal was filed by the appellant in the Allahabad High Court and this High Court of Uttaranchal now Uttarakhand has received the same under Section 35(2) of U.P. Reorganization Act, 2000.

3. In brief, the prosecution story is that the complainant Jaimal Singh, Hari Singh and Sworaj Singh were the three brothers and the Sworaj Singh had three sons namely Vijay Singh, Rajjpal Singh and Brijesh Singh (present appellant). The complainant Jaimal Singh had no child and he had executed a will in favour of his nephew Vijay Singh S/o Sworaj Singh, who is the brother of the appellant Brijesh Singh. Sri Hari Singh, the elder brother of Jaimal Singh had married with a lady who had a son namely Munnu and the Munnu had come as the son of her former husband. Hari Singh was a blind man and he had transferred some of his land in the name of Munnu Singh. Due to this reason,

Brijesh Singh felt annoyed. Brijesh Singh had told so many times to complainant Jaimal Singh and his brother Hari Singh to transfer the rest of the land in his name. The brother of the complainant Hari Singh had refused to transfer the land in his name, for this reason, Brijesh Singh was having enmity with the complainant and his brother. On 20.9.1987 at 3:00 A.M., as usual, the complainant and his brother were sleeping in their cots in the night . Then the complainant heard the sound of fire and he got up and heard the screaming of his brother Hari Singh and then he saw that Brijesh Singh had fired by pistol (Tamancha) on Hari Singh with the intention to kill him and that fire hit on the mouth of Hari Singh. When the complainant had shouted, then Brijesh Singh had also fired at him by pistol (Tamancha) with the intention to kill him and said that he would kill him. The fire hit in the head of the complainant and then he had also screamed. After hearing the noise, his neighbourers Sunder Singh and Nanhe Singh and some other persons had also reached there who had seen the appellant Brijesh in the electric light. After the incident, Brijesh ran away towards his house having pistol (Tamnacha) in his hand. For the above said incident, complainant Jaimal Singh had dictated the FIR to Ram Singh i.e. Ex.Ka-1 and he has lodged this FIR in the Police Station, Jaspur on 20.9.1987 at 3:30 A.M. The distance of the place of occurrence from the police station is 2 furlongs. The Head Constable Shishu Pal Singh has prepared the Chik Report i.e. Ex.Ka-11 and he has made the entry in the G.D., the copy of the GD is Ex.Ka-12 After that the complainant/injured was sent for medical examination to the Combine Hospital, Jaspur and he was medically examined by Dr. G.S. Joshi P.W.3 on 20.9.1987 at 4:00 A.M. and an injury report was prepared, that report is Ex.Ka-3 Sri Hari Singh, injured was also medically examined by Dr.G.S. Joshi on the same day at 4:15 A.M. and the medical report was prepared,

That report is Ex.Ka-2. A supplementary report of Hari Singh was also prepared on 26.9.1987 i.e. Ex.Ka-4 and the supplementary report of Jaimal Singh was also prepared on 26.9.987 by the Medical Officer, Combine Hospital, Jaspur i.e. Ex.Ka-5. During the investigation, the P.W.8 I.B. Nautiyal, who is the Investigating Officer of the case, has taken in his possession the blood stained clothes of the injured Hari Singh and he prepared a Fard, that Fard is Ex.Ka-6. The blood stained clothes of Jaimal Singh were also taken into possession and a Fard was prepared, i.e. Ex.Ka-7. He has also taken the blood stained clay and the plain clay in his possession and prepared a Fard, that Fard is Ex.Ka-8. He has taken into the possession Tikli blood stained and for that the Fard was prepared i.e. Ex.Ka-9. He has also taken in possession a Tikli and the teeth bloodstained and a Fard was prepared, that Fard is Ex.Ka-10. He has also prepared the site plan on the spot Ex.Ka-13.

4. X-ray of Hari Singh was also conducted. X-ray plate is on record i.e. Ex.1 and the report of radiologist is also along with the X-ray, on the basis of which the supplementary report of Hari Singh was prepared. After completing the above said investigation, the I.O. has submitted the charge sheet in the court of Additional CJM, Kashipur i.e. Ex.Ka-14.

5. The A.C.J.M., Kashipur has committed the case to the court of Sessions after complying with the provisions of Section 207 of Cr.P.C. on 3.5.1988. The II Additional Sessions Judge has framed the charge against the appellant u/s 307 I.P.C. on 9.8.1988. The charge was read over and explained to the appellant who pleaded not guilty and claimed to be tried.

6. In proof of its case, the prosecution examined P.W.1 Hari Singh, P.W.2 Jaimal Singh, P.W.3 Dr. G.S. Joshi,

P.W.4 Ram Singh, P.W.5 Daulat Singh, P.W.6 Nanhe Singh, P.W.7 Constable Shishupal Singh and P.W.8 S.I. I.B. Nautiyal, who is the I.O. of the case. Thereafter, the statement of the appellant u/s/ 313 Cr.P.C. was recorded who has denied the allegations made against him.

7. After examining all the evidence and appreciating the entire material on record, the learned II Additional Sessions Judge vide his judgment and order dated 23.06.1989 convicted the appellant u/s 326 I.P.C. and sentenced him to 3 years R.I. Against the said Judgment order dated 23.06.1989 the appellant has come up in appeal before this Court.

8. I have heard Sri B.D. Upadhyaya and Sri Atul Tripathi, learned counsel for the appellant and Sri Amit Bhatt, learned Addl. G.A. for the State.

9. P.W.1 Hari Singh is the injured witness. He has stated that they are three brothers and Brijesh (appellant) is the son of his elder brother. He and his brother Jaimal Singh have got no issue. Before the above said incident, he has transferred a part of his land to Munnu Singh who is the son of the former husband of his wife. He and Jaimal Singh were living together and the elder brother of Brijesh Singh was also living with them and they solemnized his marriage. Before this incident, he has executed a will in favour of the children of Vijay Singh, the brother of the Brijesh and for that reason, Brijesh had enmity with him and he was also asking for a land before the said occurrence but he refused to give him the land. He has further stated that about one year back, he was sleeping inside the house and his brother Jaimal Singh was also sleeping in the courtyard. About 3 o'clock in the night, an injury by firearm was caused to him due to which he received the injuries in his mouth and teeth etc. had also broken. Then he shouted and Jaimal Singh got up. Then

Jaimal Singh asked the Brijesh what you did and then he also heard the sound of one fire and after that he also heard the screaming of his brother Jaimal Singh. Then the Jaimal Singh had told him that the Brijesh had fired on him and Jaimal Singh also. At that time, Nanhe Sunder and other persons also reached there. He has further stated that thereafter he and Jaimal Singh were taken to the police station in Rickshaw and from the police station, they were taken to hospital where he was medically examined. He has further stated that the police personnel had taken his blood stained Kurta. He has also stated that he is blind since last 10 years and he could not see. This witness was cross-examined at length but nothing has come out which will create a doubt in his statement. The statement of this witness is trustworthy, reliable and believable.

10. P.W.2 is the Jaimal Singh who is also an injured witness and complainant of the case. He has stated that about one year ago, the time was about 3 o'clock in the night, he was sleeping in the courtyard and his brother Hari Singh was sleeping inside the house. He heard the sound of fire and the screaming of his brother Hari Singh. The electric light was there. Then he saw that Brijesh (appellant) who is his nephew, had come out in the room in the courtyard and then he asked Brijesh, what is the matter. On that, Brijesh had told that I will also teach you a lesson and then he fired on him by Tamancha on his head. The fire hit on the back of his head. He had also screamed and after hearing his screaming, Nanhe and Sunder and so many people also reached there. Then he had gone to see his brother Hari Singh and he had told him that Brijesh had fired on him and he also told this fact to Nanhe & Sunder. Then he had dictated the report of the incident to Ram Singh and whatever he has dictated, it was written and he has applied his thumb impression on the report, that report is Ex.Ka-1. He has also stated that Brijesh

had run away after the incident. Then the villagers took them to the police station where he had lodged the report and from the police station, they were taken to the hospital by the police where he and his brother were medically examined. He has further stated that before this incidence, he had executed a will of his land in favour of the children of Vijay Singh. For that reason, Brijesh Singh had enmity with him and was asking for land but he refused him. He has also stated that the elder brother of the Vijay Singh was living with them. This witness was also cross-examined at length but nothing has come out which will create a doubt in his statement. The statement of this witness is trustworthy, reliable and believable.

11. P.W.3 is Dr.G.S. Joshi, who has stated that on 20.9.1987, he was posted as medical officer in Combine Hospital, Jaspur. On 20.9.1987 at 4:15 A.M., he had examined Hari Singh, injured who was brought to him by Constable Ajit Singh and Constable Sudan Singh of P.S. Jaspur. He has found the following Injuries on the body of the Hari Singh:-

1. *L.W. 2.5 cm. X 1.5 cm x muscles deep on the lower lip in the middle and there is swelling of whole of his lower lip. Margins of wound are inverted. Blackening and tattooing present. A small piece of lip is missing in the middle of wound between both margins. Fresh bleeding present.*
2. *L.W. 1 cm. x 1 cm. into muscles deep on the internal surface of right of upper lip. Fresh bleeding present margins are inverted. Blackening and tattooing present. Sloughing of mucous membrane around wound present. Swelling around the wound whole of right and part of left upper lip.*
3. *L.W. 1.5 cm. through & through on the right border of tongue 3 cm. posterior to the tip of the tongue. Tattooing present. Fresh bleeding present.*
4. *Multiple small L.W. on the upper jaw on right side of gum corresponding to the root of upper lateral incisor, canine premortars (both), 1st and II molar teeth. 3rd molar is broken and loose. Fresh bleeding present from all the lacerated wounds. All the wounds are slightly connected with each other. Adv X-ray.*
5. *Three small L.W. on the lower jaw on the right side of gum corresponding to the root of lower lateral incisor, canine &*

Premolar. There is no wound at the root of 1st and 2nd molar teeth. Third molar is half broken on the outer aspect. Fresh bleeding present from the mounds. Adv. X-ray.

Dr. G.S. Joshi has stated that these injuries could come on 20.9.1987 at 3:00 A.M. and the injuries are possible by the firearm. All the injuries were kept under observation and the X-ray was advised. At the time of medical examination, he has prepared the injury report i.e. Ex.Ka-2.

12. On the Same day on 20.9.1987, Dr. G.S. Joshi has also examined Jaimal Singh at 4:00 A.M. who was brought by the Constable Ajit Singh and Constable Sunder Singh. He found the following injuries on his body:-

L.W. 3.5 cm x 1.5 cm x bone deep on the occipital region of skull slightly on the right side in the midline 14 cm away from right mastoid. Process margins of wound are inverted. Blackening & tattooing present. Fresh bleeding present from the wound. There are six (6) pieces of pallets & three small pieces of some soft material from the injury. Cork are taken out from the wound & are sealed. Out of six hard pieces 5 are almost rounded in shape and the sixth one is flattened.

13. Dr. G.S. Joshi has also stated that the injuries could be caused by the firearm on 20.9.1987 at 3:00 A.M. in the night. The injured was kept under observation and X-ray was advised and the patient was admitted. He has also prepared the report at the time of examination of injuries, that report is Ex.Ka-3. He has further stated that on 23.9.1987, he has taken the X-ray of the Hari Singh, that X-ray plate is Ex.1. On the basis of the X-ray report, on 26.9.1987 he had prepared the supplementary report i.e. Ex.Ka-4. As per the supplementary Ex.Ka-4, the injury Nos.4 and 5 are grievous in nature and injury Nos.1, 2 and 3 are simple in nature. He has also taken the X-ray of Jaimal Singh on 23.9.1987, that x-ray plate is Ex.II. On the basis of the x-ray report, he has prepared a supplementary report Ex.Ka-5. He has also stated that the injuries of Jaimal Singh were grievious in nature.

14. P.W.4 is the Ram Singh who is the scriber of the FIR. He has stated that on 20.9.1987, he had reached in the

house after receiving of the injuries by Hari Singh by firearm. Jaimal Singh had dictated the FIR to him. Whatever Jaimal Singh had stated, he had written and after that Jaimal Singh has applied his thumb impression on this report, that report is Ex.Ka-1.

15. P.W.5 is the Daulat Singh who has stated in his statement that on 20.9.1987, before him and Balbir Singh, the S.I. had taken the blood stained baniyan of injured Hari Singh in his possession and sealed on the spot and a Fard was prepared and he also proved that Fard, that Fard is Ex.Ka-6. That sealed bundle was opened in the court and after seeing the Baniyan in the court, he has identified the Baniyan. The I.O. has also taken in his possession the blood stained shirt of Jaimal Singh in his possession and that was sealed on the spot and a Fard was prepared, that Fard is Ex.Ka-7. A sealed bundle was opened in the court out of which a shirt come out. After seeing that, he had identified that this is the same shirt which was taken into possession. The baniyan is Ex.3 and the shirt is Ex.4. On the same day, the I.O. has taken the blood stained clay in his possession and sealed on the spot and a Fard was prepared, that Fard is Ex.Ka-8. He has also identified the plain clay in the court i.e. Ex.5. The sealed box was also opened and in the court, he had identified the blood stained clay i.e. Ex.6. From the place of occurrence, near the cot of Jaimal Singh where the Tikli was taken by the I.O. in his possession and was sealed on the spot, a Fard was prepared, that Fard is Ex.Ka-9. A box was opened in the court and after seeing the Tikli, he had stated that this is the same Tikli Ex.7. Near the cot of Hari Singh, the I.O. has recovered 6 broken teeths, one iron bullet and Tiklis and took the same in his possession and sealed them in a separate box and a Fard was also prepared, that Fard is Ex.Ka-10. This witness was cross-examined at length but

nothing has come out which will create a doubt in his statement.

16. P.W.6 is Nanhe Singh who has not supported the prosecution case and was declared hostile by the prosecution.

17. P.W.7 is the Head Constable, Shishu Pal Singh who has stated that on 20.9.1987, he was posted as Head Moharrir in P.S. Jaspur. On that day at 3:30 A.M., the complainant Jaimal Singh had filed a complaint in the police station and on the basis of this, he had prepared a Chik Report i.e. Ex.Ka-11 and the entry was made in the G.D., the copy of the same was prepared in the same process i.e. Ex.Ka-12.

18. P.W.8 is the I.B. Nautiyal, S.I. who is the I.O. of the case. He has stated in his statement that from 20.9.1987 to 13.12.1987, he was posted as Station Officer in P.S. Jaspur and he has investigated the present case. He has recorded the statements of the witnesses, inspected the spot, prepared the map on the spot i.e. Ex.Ka-13. He has kept the blood stained clay and the ordinary clay which were taken in the separate boxes and a Fard was prepared, that Fard is Ex.Ka-8. He has also stated that the said Fard was prepared by Head Constable, Tej Veer Singh on his dictation. From the spot, he has taken into possession a Tikli blood stained and he sealed it on the spot and a Fard was prepared, which was signed by him as well as by the witnesses i.e. Ex.Ka-9. From the place of occurrence, near the cot of the Hari Singh, one Tikli, pieces of Teeth, blood stained Tikli were taken and a Fard was prepared, that Fard is Ex.Ka-10. He has also taken the blood stained clothes of Hari Singh And Jaimal Singh in his possession and sealed them in the separate bundles and a Fard was prepared on his dictation by Head Constable Tej Veer Singh i.e. Ex.Ka-6 and Ex.Ka-7. A sealed bundle was

opened in the court and after seeing the Baniyan, he had stated that this Baniyan belongs to Hari Singh i.e. Ex.3 and after that the second bundle was opened and after seeing the shirt, he has stated that it belongs to injured Jaimal Singh i.e. Ex.4. After completing the investigation, he had filed the charge sheet against the appellant, that charge-sheet is Ex.Ka-14.

19. Thereafter, the statement of the appellant was recorded u/s 313 of Cr.P.C. He has denied the allegations made against him, however he did not produce any witness in his defence.

20. Learned counsel for the appellant has argued that the injures on the body of Hari Singh and Jaimal Singh are self-inflicted injuries. This argument of the learned counsel for the appellant has no force for the reason that Dr. G.S. Joshi, P.W.3 on the basis of the injury report prepared by him, has clearly stated that these injuries could be caused by firearm. The injured witnesses P.W.1 Hari Singh and P.W.2 Jaimal Singh have also stated that the appellant Brijesh Singh had caused the injury to them by firearm. Hence, the statements of both the witnesses are duly corroborated by the medical evidence. It is also established from the statements of the aforesaid witnesses that the injuries are not self-inflicted injuries and have been caused by the firearm.

21. Learned counsel for the appellant further argued that there is no independent witness to support the prosecution case. This argument has also got no force for the reason that the statement of the injured P.W.1 Hari Singh and P.W.2 Jaimal Singh is corroborated by the medical evidence and the injury reports Ex.Ka-2 and Ex.Ka-3 and supplementary report Ex.Ka-4 and Ex.Ka-5 prepared by Dr. G.S. Joshi. Hence, if the independent witness was not examined, then it will not create any doubt in the prosecution

story. Moreover, the incident was taken place in the night at 3:00 A.M. At that time, the people had come there after hearing the sound of fire and it is but natural that in the night at 3:00 A.M., the public witness is not possible there because incident took place in the house in courtyard and the people who had reached there, they had reached after hearing the sound of the fire.

22. From the evidence discussed above, it is well established that the appellant Brijesh who is the nephew of the P.W.1 Hari Singh and P.W.2 Jaimal Singh, have caused the firearm injuries to them on 20.9.1987 at 3:00 A.M. inside the house of Hari Singh in the courtyard. At 3:30 A.M., the FIR was lodged by the Jaimal Singh and they were taken to the police station in a Rickshaw. The distance of police station from the place of occurrence is 2 furlongs, therefore, the FIR is also prompt and there is no delay in lodging the FIR. From the police station, they were taken to the Government Combine Hospital, Jaspur where they were medically examined and the Dr.G.S. Joshi, P.W.3 has medically examined Hari Singh at 4:15 A.M. and Jaimal Singh at 4:00 A.M. and the injury reports Ex.Ka-2 of the Hari Singh and Ex.Ka-3 of the Jaimal Singh was prepared by the doctor at that time and X-ray was conducted. After the X-ray, the supplementary reports Ex.Ka-4 and Ka-5 were prepared and the doctor has stated that these injuries could be caused on 20.9.1987 at 3:00 A.M. by the firearm. The supplementary injury report of Hari Singh EX.Ka-4 shows that the Injuries No.4 and 5 are grievous and caused by some dangerous weapon like firearm. The supplementary injury report of Jaimal Singh Ex.Ka-5 also shows that the sole injury which was kept under observation, is grievous in nature. In this way, the appellant Brijesh have caused the grievous injuries to Hari Singh P.W.1 and Jaimal Singh P.W.2 by a dangerous weapon like firearm and thus, he has committed an offence

punishable u/s 326 IPC. Thus, the evidence of the injured witness P.W.1 Hari Singh and P.W.2 Jaimal Singh is corroborated by the injury reports i.e. Ex.Ka-2, Ka-3 and supplementary reports Ex.Ka-4 and Ka-5 and the statement of P.W.3 Dr. G.S. Joshi.

23. For the aforesaid reason, there is a motive also to cause the injury to Hari Singh and Jaimal Singh by the appellant. Hari Singh and Jaimal Singh had no issues and they have property and land and the Hari Singh had married with a lady who had got a son Munnu from her former husband and Hari Singh had transferred certain land to the Munnu. Hari Singh had also executed a will in favour of the children of the Vijay Singh who is the elder brother of the appellant Brijesh Singh and in the same way, the Jaimal Singh has also executed a will in favour of the children of Vijay Singh who is the elder brother of the appellant Brijesh. For that reason, the appellant has enmity with Hari Singh and Jaimal Singh. Appellant Brijesh was also demanding land from Hari Singh & Jaimal Singh but they have refused to give them the land and for this reason he had an enmity with them and the appellant is a nephew of the injured Hari Singh and Jaimal Singh. Hence, this is the strong motive against the appellant for committing this crime.

24. Thus, there is no doubt in the prosecution case and the prosecution has been able to establish its case beyond reasonable doubt that appellant has caused the firearm injuries to Hari Singh & Jaimal Singh on 20.9.1987 at 3:00 A.M. and hence the II Additional Sessions Judge, Nainital has rightly convicted the appellant u/s 326 of I.P.C. and awarded the sentence for 3 years R.I.

25. In view of the above, the judgment and order dated 23.06.1989 passed by II Additional Sessions Judge, Nainital is hereby confirmed. The conviction and sentence awarded by

learned II Additional Sessions Judge, Nainital convicting the appellant u/s 326 of I.P.C. and sentencing him for 3 years R.I. is also hereby confirmed.

26. For the reasons recorded above, the appeal is devoid of merit and is hereby dismissed.

27. Let the record of the case be sent to the trial court concerned for compliance of the order.

(Dharam Veer, J.)

Dated: June 19, 2007
Rajeev Dang